

**United States Department of Labor
Employees' Compensation Appeals Board**

R.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cherry Hill, NJ, Employer**

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**Docket No. 07-1849
Issued: March 3, 2008**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 28, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' February 23, 2007 and August 23, 2006 merit decisions. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this schedule award claim.

ISSUE

The issue is whether appellant is entitled to a schedule award for greater than 14 percent permanent impairment of the left leg.

FACTUAL HISTORY

This is the second appeal before the Board. Appellant, a 37-year-old sales and service associate, filed a Form CA-2 claim for benefits, alleging that he developed a low back condition causally related to employment factors. The Office accepted the claim for aggravation of lumbar sprain and herniated disc with regeneration. On December 26, 2002 Dr. Alexander Vaccaro, Board-certified in orthopedic surgery, performed a decompression and fusion procedure to

ameliorate appellant's diagnosed conditions of extruded disc fragment left sided, at L4-5 and L5-S1, with severe discogenic degenerative disease, L4-5 and L5-S1. On November 10, 2003 appellant filed a Form CA-7 claim for a schedule award based on a partial loss of use of his left leg. In a December 30, 2003 surgical follow-up report, Dr. Vaccaro indicated that appellant's condition was progressing except for the fact that he had lost 30 pounds since March.

In an August 27, 2003 report, Dr. David Weiss, an osteopath, found that appellant had 19 percent permanent impairment of the left lower extremity pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (fifth edition) [loss of strength], rating 12 percent impairment for motor strength deficit of the left quadriceps based on a 4+ out of 5 rating at Table 17-8 of the loss of strength and 8 percent for sensory deficit involving the L4 and L5 nerve roots. An Office medical adviser reviewed Dr. Weiss' report and found that appellant had 14 percent left lower extremity impairment. He adopted Dr. Weiss' 8 percent impairment for decreased sensation at L4-5, but stated that since 4+ weakness was almost normal, the finding of 4 out of 5 weakness of the quadriceps should be prorated from 12 percent to a 6 percent strength deficit impairment. On January 8, 2004 the Office granted appellant a schedule award for 14 percent permanent impairment of the left lower leg. By decision dated October 14, 2004, an Office hearing representative affirmed the January 8, 2004 decision. By decision dated March 4, 2005, the Office issued an amended schedule award based on an increased rate of pay.

In a surgical follow-up report dated October 20, 2004, Dr. Vaccaro stated that appellant was doing well but occasionally experienced discomfort in his left anterolateral thigh when undergoing strenuous activity. He noted that there was no evidence of a motor deficit based on tests. Dr. Vaccaro stated that appellant's sensory examination was asymmetrical.

In a November 2, 2005 decision,¹ the Board set aside the Office's January 8 and October 14, 2004 and March 4, 2005 decisions. The Board noted that both Dr. Weiss and the Office medical adviser used Tables 15-15 and 15-18, the tables for unilateral spinal nerve root impairment affecting the lower extremity, in rating eight percent impairment due to sensory deficits using the A.M.A., *Guides*. The Board noted that these physicians relied on Table 17-8 to rate appellant's loss of strength instead of Table 15-18, which, when used with Table 15-16, could also be used to rate an impairment of the lower extremity due to loss of strength from a unilateral spinal nerve root impairment, the only accepted condition. The Board therefore remanded to the Office to obtain a supplemental report from Dr. Weiss addressing why appellant's loss of strength of the left leg should not be rated using Tables 15-16 and 15-18, the tables for loss of strength due to a unilateral nerve impairment, or Table 17-6, the table for impairment due to unilateral leg muscle atrophy. The Board also directed that Dr. Weiss, in the event he still considered Table 17-8 the appropriate table to rate appellant's loss of leg strength should address the Office medical adviser's opinion that a Grade 4+ constitutes 6 percent impairment, where a grade of 4 is 12 percent impairment and a Grade 5 is 0 percent impairment. The complete facts of this case are set forth in the Board's November 2, 2005 decision and are herein incorporated by reference.

¹ Docket No. 05-1605 (issued November 2, 2005).

By letter to the Office dated November 10, 2005, appellant's attorney asked to participate in the selection of an impartial specialist, should such a referral become necessary. By letter dated November 25, 2005, the Office asked Dr. Weiss to provide a supplemental report addressing why appellant's loss of strength of the left leg should not be rated using Tables 15-16 and 15-18 or Table 17-6, as opposed to Table 17-6.

By decision dated January 11, 2006, the Office denied modification of the March 4, 2005 Office decision. The Office noted that appellant's attorney had requested that he be afforded the opportunity to participate in the selection of a referee medical examiner, despite the fact that the Board in its November 2, 2005 decision did not remand to obtain a referee medical examination. The Office found that, because it did not receive a supplemental impairment evaluation from Dr. Weiss, as the Board had requested, the medical evidence of record did not establish that appellant had a left lower extremity impairment greater than the 14 percent already awarded.

In a February 21, 2006 report, Dr. Weiss stated:

"It appears that we agree in terms of sensory deficits to the left L4 nerve root and to the left L5 nerve root. In terms of the motor strength deficit, one can either use a motor strength deficit or atrophy, combined with a sensory deficit to arrive at [appellant's] left lower extremity impairment rating. Since there is a dispute of which chart to use in the A.M.A., *Guides* in regards to the strength deficit, it may be better to use Table 17-6, page 530 in regards to atrophy. It is noted that here is a 1.5 centimeter impairment rating. The new total combined left lower extremity impairment rating would therefore be 16 percent."

By letter dated March 21, 2006, appellant's attorney requested a review of the written record.

By decision dated June 14, 2006, an Office hearing representative set aside the January 11, 2006 decision and remanded for further development of the medical evidence. The Office found that Dr. Weiss' February 21, 2006 supplemental report sufficiently explained the reasons he chose to utilize Table 17-6 to rate an impairment due to unilateral leg muscle atrophy. It further found that Dr. Weiss provided rationalized opinion that appellant has 16 percent permanent impairment of the left lower extremity utilizing the cited table of the A.M.A., *Guides*. The Office instructed the district Office on remand to review the pertinent medical record, particularly Dr. Weiss' February 21, 2006 supplemental report, and provide a reasoned opinion regarding the percentage of impairment for appellant's left lower extremity pursuant to the A.M.A., *Guides*. The Office instructed the Office medical adviser to fully explain any differences between his or her opinion and the opinion of Dr. Weiss, and to issue a *de novo* decision regarding appellant's amended schedule award entitlement.

In a memorandum dated August 21, 2006, an Office claims examiner prepared questions for the Office medical adviser. He stated:

"This examiner cannot see the rationalization behind Dr. Weiss' awarding eight percent based on Table 17-6. Table 17-6(b) indicates, that for calf leg muscle atrophy for 1 to 1.9 centimeters the impairment percentage for the lower

extremity is three to eight percent. This examiner would believe that a 1 centimeter would equate to a three percent impairment, and a 1.9 percent centimeter atrophy would equate to an eight percent impairment. This examiner questions whether Dr. Weiss' giving eight percent for an atrophy far less than 1.9 centimeters is appropriate. Please explain, whether the eight percent can or should be given for a 1.5 centimeter atrophy."

In a report dated August 22, 2006, an Office medical adviser found that appellant was not entitled to a left lower extremity impairment greater than the 14 percent already awarded. He stated:

"Based upon the latest examination (October 20, 2004) by the treating surgeon, Dr. Alexander Vaccaro, there is no motor deficit and no sensory deficit which obviously is an improvement over Dr. Weiss' examination of August 27, 2003. Dr. Weiss gave 12 percent for motor strength deficit of the quadriceps and 8 percent for L4 and L5 sensory deficits for a total of 19 percent. There were no errors except that perhaps 4 + out of 5 weakness is really 6 percent not 12 percent. If we are to accept Dr. Vaccaro's findings the rating is now zero percent."

The Office medical adviser, employing the above analysis, found that appellant reached maximum medical improvement as October 20, 2004, the date of appellant's most recent examination.²

On August 23, 2006 the Office found that the medical evidence of record did not establish that appellant had a left lower extremity impairment greater than the 14 percent already awarded. The Office indicated that Dr. Weiss failed to establish that an eight percent rating, the maximum rating permissible under Table 17-6, was an appropriate rating for a leg atrophy measuring 1.5 centimeters, when the range for calf leg muscle atrophy under Table 17-6 was from 1 to 1.9 centimeters.

By letter dated September 6, 2006, appellant's attorney requested an oral hearing, which was held on December 12, 2006.

By decision dated February 23, 2007, an Office hearing representative affirmed the August 23, 2006 decision.

² The Office noted that the Office medical adviser rejected Dr. Weiss' finding that appellant reached maximum medical improvement on April 27, 2003 -- that his condition actually improved as indicated by Dr. Vaccaro's October 20, 2004 report -- and rejected his finding that appellant was entitled to eight percent impairment for atrophy measuring 1.5 centimeters. The Office further found that, pursuant to Dr. Vaccaro's October 2004 report, appellant's impairment rating would be zero percent. Based on these findings, the Office opined that appellant's previously paid schedule award was paid based on "erroneous medical information."

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act³ set forth the number of weeks of compensation to be paid for permanent loss, or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.⁴ However, the Act does not specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides* (fifth edition) as the standard to be used for evaluating schedule losses.⁵

ANALYSIS

Following the Board's November 2, 2005 decision, Dr. Weiss in his February 21, 2006 report relied on Table 17-6, page 530, the table used for determining impairment due to unilateral leg muscle atrophy, to find an eight percent impairment based on muscle atrophy in the left quadriceps. He noted that he had measured a mild atrophy of 1.5 centimeters, out of a normal measurement of 1.9 centimeters in the left quadriceps, yielding an impairment between three percent and eight percent at Table 17-6. As Dr. Weiss found an overall combined left lower extremity impairment rating of 16 percent, taking into account the 8 percent impairment for sensory deficit at the L4 and L5 nerve roots, this totaled an 8 percent impairment for atrophy in the left quadriceps, the maximum impairment permitted under Table 17-6. The Office in its June 14, 2006 decision found that Dr. Weiss' report sufficiently explained the reasons he chose to utilize Table 17-6 for impairment due to unilateral leg muscle atrophy and remanded for further development of the medical evidence. In its August 23, 2006 decision, the Office found that Dr. Weiss' February 2006 report was not sufficient to warrant a schedule award for the left lower extremity greater than the 14 percent already awarded.

The Board finds that the Office properly determined that appellant failed to submit medical evidence sufficient to establish that he was entitled to an additional schedule award for the left lower extremity. The Office credited the opinion of the medical adviser, as opposed to that of Dr. Weiss, who failed to indicate why appellant's left quadriceps atrophy yielded an eight percent rating under Table 17-6. The Office medical adviser reviewed Dr. Weiss' report and determined that Dr. Weiss incorrectly relied on left leg atrophy measuring 1.5 centimeters to render eight percent impairment, the maximum rating permissible under Table 17-6, when the range for rating quadriceps atrophy under Table 17-6 was from 1 to 1.9 centimeters. He therefore concluded that Dr. Weiss' report was not sufficient to support an increase in appellant's schedule award. This finding was proper under the A.M.A., *Guides*.

³ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁴ 5 U.S.C. § 8107(c)(19).

⁵ 20 C.F.R. § 10.404.

Subsequent to the Office's decision, appellant requested reconsideration but did not submit any additional medical evidence. He has not established that he is entitled to a schedule award for more than 14 percent impairment of the left upper extremity.

Therefore, as there is no other probative medical evidence establishing that appellant sustained any additional permanent impairment, the Board affirms the Office's August 23, 2006 and February 23, 2007 decisions finding that he was not entitled to more than 14 percent permanent impairment to his left leg.

CONCLUSION

The Board finds that appellant has no more than 14 percent impairment of the left leg.

ORDER

IT IS HEREBY ORDERED THAT the Office's February 23, 2007 and August 23, 2006 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: March 3, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board